Served: April 15, 1998



UNITED STATES OF AMERICA DEPARTMENT OF TRANSPORTATION OFFICE OF THE SECRETARY WASHINGTON, D.C.

Issued by the Department of Transportation on the 15th day of April, 1998

Fitness Determination of

EXPRESS AIR, INC.

as a commuter air carrier under 49 U.S.C. 41738

ORDER TO SHOW CAUSE PROPOSING ISSUANCE OF COMMUTER AIR CARRIER AUTHORITY

Summary

By this order, we tentatively find that Express Air, Inc., is fit to conduct commuter air carrier operations using aircraft with no more than nine passenger seats.

Background

Section 41738 of Title 49 of the United States Code (Transportation) ("the statute") directs us to determine whether companies proposing to provide scheduled passenger service as commuter air carriers are "fit, willing, and able" to perform such service, and to ensure that all operations relating to this service conform to the safety standards established by the Federal Aviation Administration (FAA). In making fitness findings, the Department uses a three-part test that reconciles the Airline Deregulation Act's liberal entry policy with Congress' concern for operational safety and consumer protection.\(^1\) The three areas of inquiry that must be addressed in order to determine a company's fitness are whether the applicant (1) will have the managerial skills and technical ability to conduct the proposed operations, (2) will have access to resources sufficient to commence the operations proposed without posing an undue risk to consumers, and (3) will comply with the statute and regulations imposed by Federal and State agencies. We must also find that the applicant is a U.S. citizen.

Part 204 of our rules sets forth the evidence we need to make these findings.

We have received an application from Express Air, Inc., to conduct commuter operations, and, upon review of the information in the application and the safety and compliance information on the carrier received from the FAA and the National Transportation Safety Board (NTSB), we tentatively conclude that the applicant is a U.S. citizen and has met the fitness test to conduct commuter operations. We will, however, give any interested persons an opportunity to show cause why we should not adopt as final the tentative determination that Express Air is fit, willing, and able to provide commuter service.

The Carrier

Express Air was organized as a corporation under the laws of the State of Utah in 1997. The company, which is based in Phoenix, Arizona, is wholly owned by Clifford N. Langness, who is also the carrier's President and one of two members of the carrier's Board of Directors.² The carrier received authority to operate as an air taxi in August 1997 and has been conducting such operations since then. At present, its primary operations consist of overnight freight services throughout Arizona and Utah under contract with Airborne Express and United Parcel Service (UPS). Express Air has a fleet of 7 aircraft--five Piper Chieftains and two Cessna Caravans.³

If granted the commuter air carrier authority requested here, Express Air plans to commence scheduled passenger operations between Phoenix and Show Low, Arizona, using its nine-seat Piper Chieftain. Some time later, it may provide scheduled service between other Arizona points and the Grand Canyon.

Managerial Competence

As noted above, Express Air's President is Clifford Langness. Mr. Langness has over 20 years of aviation experience. From 1978 to 1985, Mr. Langness was General Manager of Lake Powell Air Service, a fixed base operator that had a small air tourism business, that was later split off into Aviation Services West. Mr. Langness served as Vice President of this company from 1985 to 1993. In 1993, Aviation Services West changed its name to Scenic Airlines and Mr. Langness became its President, a position he held until leaving in 1997. He also holds an FAA-issued Commercial Pilot license.

Larry Stephenson is Express Air's Director of Operations. Prior to joining Express Air in November 1997, Mr. Stephenson was employed as General Manager and Assistant Chief Pilot for Scenic Airlines, Inc. (1990-1997), and as Chief Pilot for PM Air, an air taxi operator (1986-1990). Mr. Stephenson holds an Airline Transport Pilot license from the FAA and has accumulated over 10,000 total flight hours during his 17 year aviation career.

² The other director is Larry Stephenson, Express Air's Director of Operations.

Although the company is currently using its aircraft for cargo services, one of the Piper Chieftains and the two Cessna Caravans have a passenger capacity of nine. The carrier advises that the aircraft to be used in its passenger services are easily converted from cargo to passenger configuration.

Express Air's Chief Pilot is L. Wayne Reynolds. From 1994 until assuming his current position in November 1997, Mr. Reynolds served as Scenic Airlines' Air Cargo Supervisor.⁴ Prior to that time, Mr. Reynolds was employed for nine years as a Flight Instructor for Airline Training Center. Mr. Reynolds holds an FAA-issued Airline Transport Pilot license and has accumulated over 9,800 total flight hours.

David Lee Clifton joined the applicant in November 1997 as its Director of Maintenance. Previously, Mr. Clifton was Maintenance Supervisor at the Phoenix maintenance branch of Scenic Airlines (1996-1997). From 1993 to 1994, Mr. Clifton ran his own fixed-base operation in Arizona. He has held other military and civilian aviation mechanic positions since 1986. He holds Commerical Pilot and Airframe and Powerplant Mechanic licenses from the FAA.

In view of the experience and background of Express Air's current management, coupled with the fact that the FAA must also review the qualifications of certain of these individuals to determine if they meet the requirements for their positions,⁵ we tentatively conclude that the company has demonstrated that it possesses the management skills and technical ability to conduct the limited operations proposed as a commuter air carrier.

Operating Proposal and Financial Condition

If granted the commuter air carrier authority requested here, Express Air plans to commence scheduled passenger operations by providing services between Show Low and Phoenix, Arizona.⁶ The applicant intends to inaugurate these services using its 9-seat Piper Chieftain aircraft, although plans are under consideration for the carrier to switch to a 9-seat Catpass 250 aircraft sometime during the first year of operations.⁷ In addition,

⁴ In this position, he had overall responsibility for operational aspects of Scenic's cargo services. This included pilot hiring and training, and route scheduling. He also served as a Part 135 Check Airman for the airline.

Before authorizing a carrier to conduct scheduled passenger operations, the FAA also evaluates certain of the carrier's key personnel with respect to the minimum qualifications for those positions as prescribed in Parts 119 and 135 of the Federal Aviation Regulations. The FAA's evaluation of these key personnel provides an added practical and in-person test of the skills and technical ability of these individuals.

At present, the applicant plans to provide an average of two daily round trips in the market, although it may add additional flights in the market should the demand for its services support it. Notwithstanding its expansion in to commuter operations, the applicant's first year business plan anticipates that its contract cargo services will constitute the bulk of its air carrier services.

The Catpass 250 is a modified Beechcraft King Air 200 series aircraft.

once the Catpass 250 is added to its fleet, the carrier may expand its passenger services to include flights between other Arizona points and the Grand Canyon.⁸

Express Air supplied a balance sheet at December 31, 1997, and an income statement for four months ending December 31, 1997. It also provided a listing of the expenses associated with the start-up of its proposed operations, along with a detailed forecast of expected operating expenses for the first year of operations. We have reviewed these forecasts and find that they appear to be reasonable for the services proposed.

A review of the company's financial statements indicates that, for the four months it has operated, it had a small operating profit, with a net loss in the low five-figures. Its December 31, 1997, balance sheet reflects total assets in the low seven-figures, negative retained earnings and positive stockholders' equity each in the low five-figures. The statement further indicates that, at that date, it had positive working capital in the low six-figures and a current assets to current liabilities ratio of approximately 1.89 to 1. Mr. Langness, Express Air's owner, has pledged personal financial resources in the low six-figures to support the company's operations if such funds are needed. These funds, together with its internal working capital, are sufficient to meet our financial test.

In light of the above, we tentatively conclude that Express Air will have access to financial resources sufficient to enable it to commence its proposed commuter operations without posing an undue risk to consumers or their funds.¹³

Compliance Disposition

⁸ If it provides such services, it plans to use aircraft in its current fleet. We note, however, that there presently are certain FAA restrictions on flights involving the Grand Canyon. Thus, the company's ability to serve the Grand Canyon is subject to its first obtaining appropriate FAA approval to do so.

Notwithstanding these initial losses, the applicant forecasts that the Airborne Express and UPS contracts that it entered into in November will result in profitable operations for the company in the future.

The applicant provided bank statements showing that, at December 31, it had cash deposits totaling in the low six-figures.

As evidence of the availability of these funds, we have received third-party verification from Mr. Languess' investment company evidencing the availability of these funds.

In evaluating an applicant's financial fitness, the Department generally asks that the company have available to it resources sufficient to cover all pre-operating costs plus a working capital reserve equal to the operating costs that would be incurred in three months of normal commuter operations. Because projected operations during one or more of the first three months of anticipated commuter services frequently do not include all costs that will be incurred during a normal period of operations, it is our practice to base our three-month test on one quarter of the first year's operating cost forecast. In calculating available resources, projected revenues may not be used.

As is our practice, if the applicant is found fit, prior to making its authority effective, we will require that it demonstrate that it continues to have the financial resources needed to meet our financial test.

We also tentatively conclude that Express Air has the proper regard for the laws and regulations governing its services to ensure that its aircraft and personnel conform to applicable safety standards and that acceptable consumer relations practices will be followed.¹⁴

In addition, the applicant has stated that there are no actions or outstanding judgments against it, its owners, or its key personnel, nor have there been any charges of unfair, deceptive or anti-competitive business practices, or of fraud, felony or antitrust violations brought against any of these parties. Express Air states further that there have been no formal complaints filed or orders issued finding it, its key personnel, or persons having a substantial interest in it to be in violation of the statute or of the Federal Aviation Regulations.

Our search of the Department's enforcement files found no record of problems involving this company, its owners, or its key personnel. Further, a search of FAA and NTSB records indicates that Express Air has had no FAA enforcement actions taken against it, nor has it been involved in any accidents or incidents. The FAA has advised us that the applicant is working with that agency to amend its operations specifications to authorize it to conduct scheduled passenger operations, and that it has no objection to the Department's grant of Express Air's request for commuter authority.

CITIZENSHIP

49 U.S.C. 41102 requires that authority to engage in air transportation be held only by citizens of the United States as defined in 49 U.S.C. 40102(a)(15). That section requires that the president and two-thirds of the Board of Directors and other managing officers be U.S. citizens and that at least 75 percent of the outstanding voting stock be owned by U.S. citizens. We have also interpreted the statute to mean that, as a factual matter, the carrier must actually be controlled by U.S. citizens.

Express Air is a corporation organized under the laws of the State of Utah. Its sole shareholder, Clifford Langness, is a citizen of the United States, as are its other key management personnel. Further, the carrier has provided an affidavit stating that it is a U.S. citizen within the meaning of section 40102(a)(15), and there is nothing in the record that would otherwise indicate that Express Air is controlled by non-U.S. citizens.

In view of the foregoing, we tentatively conclude that Express Air is a U.S. citizen and that it is fit, willing, and able to provide the scheduled passenger service it proposes as a commuter air carrier.

OBJECTIONS

We will give interested persons 14 days following the service date of this order to show cause why the tentative findings and conclusions made here should not be made final; answers to

The City of Show Low has advised us that its experience with commuter services provided by Scenic Airlines while Mr. Langness was President of that carrier was a positive one and that Show Low fully supports the commuter services proposed by the applicant.

objections will be due within 7 days thereafter.¹⁵ We expect that persons objecting to our tentative findings and conclusions will support their objections with relevant and material facts. We will not entertain general, vague, or unsupported objections. If no substantive objections are filed, we will enter an order making final our tentative findings and conclusions with respect to Express Air's fitness and commuter authority.

EFFECTIVE COMMUTER AUTHORIZATION CONDITIONS AND LIMITATIONS

In the event that we find Express Air fit, willing, and able to conduct the proposed scheduled passenger operations, we will issue to it a Commuter Air Carrier Authorization. However, that authorization will not become effective until the carrier has fulfilled all of the requirements for effectiveness as set forth in the Terms, Conditions, and Limitations attached to its authorization. Among other things, this includes our receipt of amended Operations Specifications from the FAA authorizing scheduled passenger operations, and evidence of liability insurance coverage meeting the requirements of section 205.5(b) of our rules, as well as updated fitness information.

We also note that our finding of fitness for Express Air is based on the operating plans described in its application, namely, aircraft that can be operated under Part 135 of the FARs. Were the applicant to propose to expand its operations to include larger aircraft, our findings of fitness may no longer apply.¹⁶ Therefore, we propose to limit any commuter authority issued to Express Air to operations with aircraft that can be operated under Part 135 of the FARs. Should Express Air subsequently desire to operate larger aircraft, it must first be determined fit for such operations.

Furthermore, we remind Express Air of the requirements of 49 U.S.C. 41110(e). Specifically, that section requires that, once a company is found fit initially, it must remain fit in order to hold its authority. Thus, should Express Air propose any other substantial changes, such as in its ownership, management, or operations, it must first comply with the requirements of

Although it does not object to Express Air's proposed commuter operations, *per se*, by letter addressed to Express Air dated March 4, 1998, Express One International encouraged the applicant to select another name so as to avoid the possibility of confusion with Express One. Express One has not requested that the Department take any action in this matter nor do we see any reason to do so at this time. Express Air has advised us that it is considering whether to use a different name in its business. Moreover, as a rule, the Department no longer makes public interest determinations regarding the use of similar names by air carriers; instead, carriers are encouraged to resolve potential problems among themselves according to applicable statutes and in the courts. The Department does, however, retain its authority under section 41712 to take enforcement against unfair or deceptive practices in the use of names should such action be necessary.

¹⁶ In this regard, we note that the operation of commuter services with aircraft having a seating capacity of 10 or more would require the carrier to transition to Part 121 of the FARs, a step which may require the applicant to obtain additional management personnel and/or incur additional financial outlays.

section 204.5 of our regulations.¹⁷ The compliance of the company with this requirement is essential if we are to carry out our responsibilities under the statute.¹⁸

ACCORDINGLY,

- 1. We direct all interested persons to show cause why we should not issue an order finding that Express Air, Inc., is fit, willing, and able under 49 U.S.C. 41738 to provide scheduled passenger service as a commuter air carrier.
- 2. We direct any interested persons having objections to the issuance of an order making final any of the proposed fitness findings set out here to file such objections with Delores King, Air Carrier Fitness Division, X-56, Department of Transportation, 400 7th Street, S.W., Washington, D.C. 20590, and serve them on all persons listed in Attachment A no later than 14 days after the service date of this order; answers to objections will be due within 7 days thereafter.
- 3. We will accord full consideration to the matters and issues raised in any timely and properly filed objections before we take further action.
- 4. In the event no one files objections, we will deem all further procedural steps waived, and we will enter an order making final the tentative findings and conclusions set out here and awarding Express Air, Inc., a Commuter Air Carrier Authorization, subject to the attached specimen Terms, Conditions, and Limitations.¹⁹
- 5. We will serve a copy of this order on the persons listed in Attachment A.
- 6. We will publish a notice of this order in the Federal Register.

Express Air may contact our Air Carrier Fitness Division to report proposed substantial changes in its operations, ownership, or management, and to determine what additional information, if any, will be required under section 204.5. If the carrier fails to file the information or if the information fails to demonstrate that the carrier will continue to be fit upon implementation of the substantial change, the Department may take such action as is appropriate, including enforcement action or steps to modify, suspend, or revoke the carrier's commuter authority.

We also remind Express Air about the requirements of section 204.7 of our rules which provides, among other things, that: (1) the commuter authority granted to a company shall be revoked if the company does not commence actual flying operations under that authority within one year of the date of the Department's determination of its fitness; (2) if the company commences operations for which it was found fit and subsequently ceases such operations, it cannot resume commuter operations unless its fitness has been redetermined; and (3) if the company does not resume operations within one year of its cessation, its authority shall be revoked for dormancy. The carrier must file a notice of its intent to resume operations at least 45 days prior to said resumption. This notice shall contain updated fitness information.

Since we have provided for the filing of objections to this order, we will not entertain petitions for reconsideration.

By:

CHARLES A. HUNNICUTT

Assistant Secretary for Aviation and International Affairs

(SEAL)

An electronic version of this document is available on the World Wide Web at http://dms.dot.gov

Specimen



Terms, Conditions, and Limitations

EXPRESS AIR, INC.

is authorized to engage in scheduled passenger air transportation operations as a commuter air carrier.

This authority is subject to the following provisions:

- (1) The authority to conduct scheduled passenger operations will not become effective until six (business) days after the Department has received the following documents; <u>provided</u>, <u>however</u>, that the Department may stay the effectiveness of this authority at any time prior to that date:
 - (a) A copy of the holder's Air Carrier Certificate and Operations Specifications authorizing such operations from the Federal Aviation Administration (FAA).
 - (b) A certificate of insurance on OST Form 6410 evidencing liability insurance coverage meeting the requirements of 14 CFR 205.5(b) for all of its aircraft.
 - (c) A statement of any changes the holder has undergone in its ownership, key personnel, operating plans, financial posture, or compliance history, since the date of the Show Cause Order in this case.
 - (d) A revised list of pre-operating expenses already paid and those remaining to be paid, as well as independent verification that the holder has available to it funds sufficient to cover any remaining pre-operating expenses and to provide a working capital reserve equal to the operating costs that would be incurred in three months of operations.
- (2) Pending receipt of effective authority, the holder may not accept payment of any kind (i.e., cash, check, or credit card) or issue tickets for scheduled passenger operations, and any advertisement or listing of flights by the holder must prominently state: "This service is subject to receipt of government operating authority."
- (3) The holder shall at all times conduct its operations in accordance with the requirements of 14 CFR Part 298 and any other regulations prescribed by the Department of Transportation for the services authorized here, and with such other reasonable terms, conditions, and limitations as the Department of Transportation may prescribe in the public interest.
- (4) The holder may not operate aircraft designed to have a maximum passenger capacity of more than 9 passenger seats.

- (5) The holder's authority is effective only to the extent that such operations are also authorized by the FAA.
- (6) The holder shall at all times remain a "Citizen of the United States" as required by 49 U.S.C. 40102(a)(15).
- (7) The holder shall maintain in effect liability insurance coverage as required under 14 CFR Part 205. Failure to maintain such insurance coverage will render this authority ineffective, and this or other failure to comply with the provisions of Subtitle VII of Title 49 of the United States Code or the Department's regulations shall be sufficient grounds to revoke this authority.
- (8) The holder shall maintain in effect at all times with the Department of Transportation current information on OST Registration Form 4507.
- (9) The holder may not provide scheduled passenger air transportation to or from Dallas (Love Field), Texas, except within the limits set forth in section 29 of the International Air Transportation Competition Act of 1979, as amended by section 337 of the Department of Transportation and Related Agencies Appropriations Act, 1998.
- (10) Should the holder propose any substantial changes in its ownership, management, or operations (as that term is defined in 14 CFR 204.2(n)), it must first comply with the requirements of 14 CFR 204.5.
- (11) In the event that the holder does not commence actual flying operations as a commuter air carrier under this authority within one year of the date of the Department's determination of its fitness, its commuter authority shall be revoked for dormancy. Further, in the event that the holder commences but subsequently ceases all scheduled passenger operations, the authority granted here shall be suspended under the terms of 14 CFR 204.7 and the holder may neither recommence nor advertise such operations unless its fitness to do so has been redetermined by the Department. Moreover, if the holder does not resume operations within one year of its cessation, its authority shall be revoked for dormancy.

SERVICE LIST FOR EXPRESS AIR, INC.

Mr. Cliff Langness President Express Air Inc 2635 E Airlane Phoenix Az 85034

The Honorable Gerry Whipple Mayor, City of Show Low 200 West Cooley Show Low Az 85901

Manager Flight Standards District Office Federal Aviation Administration 15041 N Airport Dr Scottsdale Az 85260

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